SUPREME COURT, U. S.

No. 74-1020

In the

Supreme Court of the United States

OCTOBER TERM, 1974

ALLSTATE MORTGAGE CORPORATION,
CHARLES KARP,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PATRICK A. TUITE,
134 N. LaSalle Street,
Chicago, Illinois 60602,
Attorney for Petitioners.

The Scheffer Press, Inc.—(312) 263-6850

INDEX

	PAGE
OPINION BELOW	1
JURISDICTION	2
HISTORY OF THE CASE	2
ISSUES PRESENTED FOR REVIEW	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	16

Table Of Authorities

Cases:

Bivens v. Six Unknown Named Federal Narcotics Agents, 403 U.S. 388 (1971)	10
Brady v. Maryland, 373 U.S. 83 (1963)	8
Bray v. Peyton, 429 F.2d 500 (4th Cir. 1970)	8
Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476	14
Earl v. United States, 361 F.2d 531 (D.C. Cir. 1966)	7
Garrity v. New Jersey, 385 U.S. 493 (1967)	9
Kastigar v. United States, 406 U.S. 441 (1972)	7
Roviaro v. United States, 353 U.S. 53 (1957)	10
United States v. Echeles, 352 F.2d 892 (7th Cir. 1965)	15
United States v. Gregorio, 497 F.2d 1253 (4th Cir. 1974)	9
United States v. Mendez-Rodriguez, 450 F.2d 1 (9th Cir. 1971)	8
United States v. Shavin, 287 F.2d 647 (7th Cir. 1961)	12
United States v. Turnipseed, 272 F.2d 106 (7th Cir. 1959)	15
Washington v. Texas, 388 U.S. 14 (1967)	10
Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441	15

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No.

ALLSTATE MORTGAGE CORPORATION,
CHARLES KARP,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on December 10, 1974.

OPINION BELOW

The opinion below has not yet been published but is reprinted herein as Appendix A, *infra.*

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit (Appendix A, *infra*) was entered on December 10, 1974. A timely motion for a petition for rehearing en banc was denied on January 13, 1975 (Appendix B, *infra*). This petition is filed within 30 days of the final order of the United States Court of Appeals. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

HISTORY OF THE CASE

Charles Karp and Allstate Mortgage Co. were indicted and convicted in 11 counts for devising a scheme to defraud wherein the mails were an integral part of the scheme in violation of Title 18 U.S.C. Sec. 1341. Further, the defendants were convicted of violations of Title 18 U.S.C. Sec. 1010 for causing false statements to be submitted to The Federal Housing Authority (FHA).

After the convictions in a bench trial the Court sentenced Charles Karp to one year imprisonment on the mail fraud counts (to run concurrently) and one year on the false statement counts (to run concurrently) but the two one-year sentences were ordered to run consecutively. The Corporation was fined $18,000.

ISSUES PRESENTED FOR REVIEW

1. Were the petitioners denied their rights to attendance of witnesses and to due process of law guaranteed by the Fifth and Sixth Amendments to the United States Constitution when the judge would not grant use immunity to a material defense witness who in good faith invoked his privilege against self-incrimination?

2. Were the petitioners denied their rights to confront witnesses against them as guaranteed by the Sixth Amendment to the United States Constitution when the trial Court took into consideration a post scheme statement of a non-testifying co-defendant in deprecating a valid defense?

CONSTITUTIONAL PROVISIONS INVOLVED

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . ." Amendment VI to the United States Constitution.

"No person shall . . . be deprived of life, liberty or property, without due process of law. . ." Amendment V to the United States Constitution.

REASONS FOR GRANTING THE WRIT

I.

THE PETITIONERS WERE DENIED DUE PROCESS OF LAW AND THEIR RIGHT TO COMPEL ATTENDANCE OF WITNESSES WHEN THE TRIAL COURT DID NOT GRANT USE IMMUNITY TO A MATERIAL DEFENSE WITNESS WHO HAD ASSERTED HIS PRIVILEGE AGAINST SELF-INCRIMINATION.

In the last eight counts of the indictment Charles Karp and/or Allstate Mortgage Co., a mortgage brokerage firm, not a mortgagee, were charged with violations of 18 U.S.C. 1010 for causing false statements to be submitted to the FHA to induce them to issue mortgage insurance. It was alleged that on the FHA Form 2900, a form used by the FHA to pass on mortgage insurance applications, a figure less than the true broker's fee was listed. These counts charged the petitioners with causing these lesser amounts to be submitted.

An outline of the procedures involved in obtaining an FHA insured mortgage will be set out here for a complete understanding of the issues.

When a home owner applies for an FHA insured mortgage he fills out a form known as a 2800 Form. This document contains information about the physical structure of the premises such as number of rooms, type of heat, type of construction and other factors which would help assess a value on the property. An FHA inspector then inspects the property and based on all these factors the FHA gives a conditional commitment—that is, the maximum mortgage amount it will insure.

The owner through the mortgagee then submits a credit statement to the FHA which is referred to as Form 2900. On this form the applicant lists his income, his liabilities, his dependents and other information pertinent to his ability to repay the insured mortgage.

In addition there is space on Form 2900 for the amount of money needed at the closing of the transaction. This includes payment of the principal indebtedness, payments to lien holders and closing costs. Amongst the closing costs is space for any broker's fee to be entered.

In the instant case it was established that the figure for the broker's fee on Form 2900 and the amount received by the petitioner at the closing did not match and that the petitioner received more than listed on Form 2900.

However, the Government's own witness testified that the mortgagee—not the broker—completed the Form 2900 and did not show them to the petitioner for his approval nor did the petitioner in any way assist in the completion of the document.

In an attempt to show that the mortgage broker does not fill out the Form 2900 and that it was an industry practice in Chicago for mortgagees to use estimates instead of actual figures for the closing cost requirements on the form, the petitioner called as a witness Wyatt Ross, the former manager of Mortgage Associates, a mortgage banking firm in Chicago.

Mr. Ross asserted his privilege against self-incrimination when asked about the industry practice in completing Form 2900.

A petition was presented to the Court in an effort to grant Mr. Ross use immunity along with an offer of what Mr. Ross would say if granted use immunity.

Mr. Ross, the petitioner offered to prove, would testify that it was the practice of Mortgage Associates and the mortgage banking industry in Chicago to first compute all of the debts and enter them in the Form 2900 and then enter the difference between all monies needed to close the transaction and the conditional commitment from the FHA as the broker's fee. It was, of course, clear that the monies to be dispersed at the closing could not exceed the conditional commitment. Mr. Ross did testify, as did others, that they knew Allstate Mortgage Company's fee was $1,000 in all cases.

An example of the industry practice is as follows:

If the conditional commitment by the FHA was $20,000 and there was an outstanding balance of $18,000 on the existing indebtedness and $1,500 in closing costs, the mortgage company would reflect Allstate's broker's fee as $500 on the 2900 because that was the only figure they could insert in the form without exceeding the $20,000 conditional commitment. At the time of the closing, however, which might have been 6 to 8 months later, the existing indebtedness would be reduced and Allstate would receive its full $1,000 fee or as much of it as was available at the time of closing.

The offer of proof also showed that Mr. Ross would have testified, if granted immunity, that these manipulations with numbers were done by the mortgage companies without the knowledge or complicity of the mortgage broker.

At the trial the Government objected to the grant of immunity. The trial judge ruled that he was inclined to receive evidence of other transactions, which would show Charles Karp's knowledge or good faith. The Court found the proffered testimony to be material and that

Mr. Ross was asserting his privilege in good faith but in the final analysis held that he did not have the authority to grant a defendant's petition for immunity. The Court further ruled that he was not reaching the question of his discretion in the matter but was denying the petition solely on the ground that he did not have power to entertain it.

The Government in opposing the petition for immunity cited to the Court *Earl* v. *United States,* 361 F.2d 531 (D.C. Cir. 1966), a case which dealt with the prior statute on immunity, 18 U.S.C. 1406. The immunity provided for and which was considered in the *Earl* case was transactional immunity; that is to say, that a witness could not be prosecuted about any transaction which was mentioned in his testimony. Congress had granted the power to grant such immunity only to the prosecution, and *Earl* v. *United States, supra,* recognized that by giving transactional immunity over the Government's objection, the Court was denying the prosecution the ability to prosecute and was interfering with decisions best left to the prosecution. At the time of the petition in this case, however, Title 18 had been amended to allow for use immunity under Title 18 U.S.C. 6003. Although that provision still only deals with governmental petitions for immunity, the grant of immunity does not preclude the government from prosecuting the witness, but only bars them from using the testimony so compelled or any leads therefrom against the witness. This Court in *Kastigar* v. *United States,* 406 U.S. 441 (1972) upheld the constitutionality of the use immunity statute and Justice Blackmun writing for the majority in the case held that granting use immunity was no different than if the witness had not testified at all, but instead stood on his Fifth Amendment privilege.

If the trial Court granted immunity to this essential defense witness in the instant case it would not have prevented the Government from using the testimony or leads therefrom against him. And as mentioned in *Kastigar*, the situation would have been no different than if the witness had not testified at all.

The Sixth Amendment to the United States Constitution guarantees the compulsory attendance of witnesses on behalf of the defendant and cases have held that when the Government interferes with the defendant's ability to freely call witnesses on his own behalf, due process of law and the rights guaranteed by the Sixth Amendment are denied. In *Bray* v. *Peyton*, 429 F.2d 500 (4th Cir. 1970) the jailing of a witness against whom the charges were dropped earlier was held to have a chilling effect on his ability to testify and thereby a violation of the Sixth Amendment. In *United States* v. *Mendez-Rodriguez*, 450 F.2d 1 (9th Cir. 1971) the prosecution returned a material defense witness to Mexico and this was held to be a blatant denial of access to witnesses and therefore a violation of due process.

The proposition that the prosecutor cannot suppress evidence favorable to the defendant which was enunciated in *Brady* v. *Maryland*, 373 U.S. 83 (1963) would be an anomaly if that same holding did not apply to the Government's refusal to acquiesce in the grant of use immunity to a material defense witness. For all practical purposes what difference is there between the situation where the Government suppresses evidence favorable to the defendant or where the Government refuses to go along with the grant of use immunity for a material defense witness? The Government contended at trial that it is an interference with a basic prosecutorial decision whether someone should receive immunity or not. We

submit that the question now is not giving the witness total immunity versus prosecution but only giving him use immunity and still allowing the prosecutors, if they so see fit and if they have the evidence, to prosecute the witness with evidence independent of his testimony.

The trial Court pointed out the anomaly of this situation by stating that if he had ruled that Ross had to testify, notwithstanding his assertion of the privilege, he would in effect be granting Ross use immunity. Such testimony having been compelled by a Court could not be considered the voluntary statement of a witness and that statement or any leads therefrom could not be used against the witness. In *Garrity* v. *New Jersey,* 385 U.S. 493 (1967) this Court recognized the psychological compulsion aspect in giving statements and ruled that statements given under compulsion of giving a statement or losing one's job would not be admissible in Court. So, too, a statement psychologically compelled in Court by a judge would lead to the same conclusion.

All the cases cited by the Government and by the 7th Circuit in affirming this conviction dealt with the transactional immunity Statute, 18 U.S.C. 6003. There has been no case, to your petitioner's knowledge which has decided the issue herein.

Recently the issue was raised in *United States* v. *Gregorio,* 497 F.2d 1253 (4th Cir. 1974). The Court there declined to pass on the matter pointing out however that it might have considered it if the petition for immunity had been presented to the District Court (as it was here), and there had been an offer of proof to provide a basis for an intelligent disposition of the petition (such an offer was made in the instant case).

This Court has held that the right to offer relevant testimony is a fundamental right to present a defense guar-

anteed by the due process clause. *Washington* v. *Texas,* 388 U.S. 14 (1967).

By denying the defendant the opportunity to present a material witness in his own behalf, the defendant did not have the right to present a defense.

To argue that Congress only granted the Government the authority to petition for immunity misreads the Statute. While 18 U.S.C. 6001 allows the Court to act on the Government's petition for immunity there is nothing in the act which prohibits the Court from acting on a defendant's petition. Courts have inherent rights in the conduct of trials before them to see that justice is accomplished.

This Court has in the past found that a citizen has a remedy in money damages for an illegal search and seizure where no such remedy existed by Statute. *Bivens* v. *Six Unknown Named Federal Narcotics Agents,* 403 U.S. 388 (1971).

What is needed here is a balancing between the Government's right to prosecute and a defendant's right to present material witnesses on his own behalf. This Court in *Roviaro* v. *United States,* 353 U.S. 53 (1957) weighed the interest of the Government in protecting confidential informants versus the defendant's rights to present a material witness on his behalf and having done so, decided for the defendant.

As mentioned earlier, the Courts now have the power to grant use immunity which does not preclude the Government from prosecuting the witness with independent evidence. The Court, therefore, is not interfering with the prosecutor's functions as would have been the case under the former Statute. In balancing the right of the Government to prosecute, which is not lost under these

circumstances versus the right of a defendant to present a material witness, which has been lost here, the choice seems clear. The Government is not being injured by the granting of use immunity but the defendant may be irreparably harmed by the refusal to grant the petition.

As this is an important issue which materially affects these petitioners and all others similarly situated we respectfully ask this Court to issue the writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit Court of Appeals.

II.

THE PETITIONERS WERE DENIED THE RIGHT TO CONFRONT THE WITNESSES AGAINST THEM WHEN THE COURT TOOK INTO CONSIDERATION A POST SCHEME STATEMENT OF A NON-TESTIFYING CO-DEFENDANT IN DISREGARDING A VALID DEFENSE.

Karp and Allstate Mortgage Co. were in the business of trying to get persons who had purchased their homes under a contract or articles of agreement to convert that contract into a mortgage. Various salesmen, including Karp, contacted home owners and tried to sell them on the advantages of having a mortgage instead of only a contract. It was alleged that the sales persons did not inform the owners that there would be a $1,000 fee payable to Allstate if a mortgage was obtained. The Government called 12 witnesses who testified that they were contacted by an Allstate salesman, that they decided to try to get a mortgage, signed certain documents but never were told that they would be indebted to Allstate for $1,000. Most of the people testified that the agreement with Allstate was blank at the time of the signing. It was established that at the closing, after a

mortgage was obtained, $1,000 of the mortgage proceeds were paid to Mr. Karp on behalf of Allstate. This $1,000 was then included in the indebtedness that the owner paid off in monthly installments to the mortgagor.

Some people who applied for a mortgage, received a favorable credit report but refused to go through with the agreement were sued for either the costs of Allstate in applying for the mortgage or the full $1,000.

In defense Karp presented 12 witnesses who were home owners and were similarly situated to the prosecution witnesses. They all testified that the Allstate salesman told them about the fee and they were extremely satisfied with the mortgages obtained by Allstate for them. Such a defense is proper. *United States* v. *Shavin,* 287 F.2d 647 (7th Cir. 1961)

At his arrest a co-defendant, Howard Berg, an Allstate salesman, told the FBI that on many occasions he would not tell a prospective mortgage applicant about the Allstate fee if he thought they would refuse to sign the application. (Allstate salesmen would receive $25 for each application they brought in.)

Prior to trial Karp and Allstate moved for a severance from Berg because of this post arrest statement but the Court denied the motion, ruling instead that he would handle the problem at the time, if ever, it arose during the trial. The Court agreed, however, that Berg's statement was only attributable to Berg and no one else.

During the closing argument, the attorney for Karp and Allstate argued that there was no scheme to defraud and pointed to the satisfied witnesses of the defense to emphasize his position.

The Court, however, then stated in response to Counsel for Karp:

"Mr. Tuite: Of course not, no. But I submit that if there was a scheme, there would have been people of—I shouldn't say of lack of educational background, or similar people would have been similarly defrauded. I don't see why if there was a scheme, that a Mr. Wiginton would be defrauded, or there would be a scheme to defraud him and not Mrs. Demetral, or any of the other people that testified.

I don't think I perceived any great intellectual superiority of defense witnesses over Government witnesses; that the reason these people weren't defrauded is that they were intellectually sharper and, therefore, they couldn't be.

I think these were just ordinary, middle or even lower-middle class people who were in financial difficulties and were dealt with.

Of course, you can defraud one person and not the other. But it doesn't seem reasonable that they would pick on those 12 that the Government had come in, and not 10 other people who were similarly situated in life, and whose educational background, as far as I could see, did not set them apart.

Mrs. Curry was 18 years with the Government, but then again you have Mrs. Ham Ying who seemed to be a very intelligent, educated woman. The Powells—an ordinary couple, I don't think much different than a number of people that the Government called to testify, all at about the same time.

These transactions all took place about the same time, in the same areas. And I submit that it at least raises the question of doubt, it raises the question of reasonable doubt if there was a scheme to defraud.

The Court: It shows—in a degree, though, Mr. Tuite, it shows the real problems which attend proof of so-called similar transactions. Because the conceded similarity—and I assume the Government would

concede it, that these people are from essentially the same background, and they were all for one reason or another interested in refinancing. But beyond that, the method of selling here, totally apart now from whether there was or wasn't a scheme—the personal encounter, method of selling, door to door selling, those conversations unfolded in such a way that as *Agent Van Loon has testified Mr. Berg said, he didn't disclose the fee if he was afraid he was going to lose the sale or the customer.* And in some instances it seems reasonable to infer that a person in the situation that your witnesses were would demonstrate a particular type of interest in the transaction, might inquire on their own about what the fee was, the conversation might proceed in such a way as to cause the salesman to believe, 'Here I can disclose it to them.'

And, indeed, you end up with a couple of agreements that are footnoted, percentages are used rather than dollar figures, and then you take another person who manifests apprehension about the fee, and the salesman concludes in this case, 'I'm not going to tell him.' " (R. 2516-19) (emphasis added)

It is clear therefore that the Court, contrary to his initial ruling that Berg's statement would only be admissible against Berg, took into consideration in deprecating a proper defense, an inadmissible statement of a co-defendant.

This Co in *Bruton* v. *United States,* 391 U.S. 123, 88 S. Ct. 1620, 20 L.Ed.2d 476, held it to be a violation of the Sixth Amendment right to confrontation of witnesses to use a hearsay statement of a co-defendant in a joint trial even though limiting instructions are given. Although the instant case involved a bench trial and there is a presumption that the trial Court only will consider competent evidence that presumption is not unrebuttable and

where the record is clear that the trial Court did consider improper evidence, a reversal is warranted.

This Court in *Wong Sun* v. *United States,* 371 U.S. 471, 83 S. Ct. 407, 9 L.Ed.2d 441, reversed a conviction when it was not clear that the trial Court, also in a bench trial, may not also have considered a co-defendant's statement as corroboration of the accusation. This Court held that even though the case was tried without a jury where the Court overruled objections concerning the admissibility of the statement as against a non-declarant it would not be presumed that the Court disregarded the statement in considering the non-declarant's guilt.

In *United States* v. *Turnipseed,* 272 F.2d 106 (7th Cir. 1959) the trial Court made certain remarks which appear in the co-defendant's confession and that Court in reversing the conviction held that where there was a number of defendants tried together in a bench trial and the evidence is received as to some, but not as to others, that it was error for the Court to consider evidence admissible only as to one in reaching its findings as to all.

While *Bruton, supra,* dealt with the use of an extrajudicial statement which inculpates the non-declarant defendant, there appears to be no logical reason to refuse to apply the rule to this type of case. The use of an extrajudicial statement of a co-defendant which statement was not under oath and not subject to cross-examination and which is used in considering the guilt of the defendant is a violation of this rights guaranteed by the Sixth Amendment.

To allow the use of Berg's statement to the obvious detriment of the petitioners is a classic violation of the right to confrontation.

Berg never testified and the petitioners could not call a co-defendant as their own witness. *United States* v. *Echeles,* 352 F.2d 892 (7th Cir. 1965).

While *Bruton* and its progeny have dealt with the use of a co-defendant's hearsay statement to incriminate a defendant there is as strong a need for the rule to apply when the statement is used to thwart a valid defense. A clear example of this type of harm can be seen where after an alibi is presented by a defendant, a police officer testifies in rebuttal that another person told him that the defendant was not where he testified he was. While the hearsay statement does not incriminate the defendant, it surely materially affects his defense without the ability to cross-examine.

For this reason your petitioners also pray this Honorable Court to grant the petition for certiorari.

CONCLUSION

For the above-stated reasons your petitioners pray this Honorable Court to grant the writ of certiorari to review the judgment of affirmance of the Circuit Court of Appeals for the Seventh Circuit.

Respectfully submitted,

PATRICK A. TUITE
134 N. LaSalle St.
Chicago, Illinois 60602
Attorney for Petitioners

APPENDIX A

In The

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 74-1322

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALLSTATE MORTGAGE CORPORATION, CHARLES KARP and HOWARD BERG,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 73 CR 481

PRENTICE H. MARSHALL, *Judge*

ARGUED OCTOBER 23, 1974 — DECIDED DECEMBER 10, 1974

Before SWYGERT, *Chief Judge*, CASTLE, *Senior Circuit Judge*, and KILKENNY, *Senior Circuit Judge.**

PER CURIAM. Appellants were indicted and convicted, in a court trial, on eleven mail fraud counts in violation of 18 U.S.C. § 1341. Additionally, appellants Allstate and Karp were indicted and convicted on two and Karp alone on three false statement counts in violation of 18 U.S.C. § 1010.

* Honorable John F. Kilkenny of the United States Court of Appeals for the Ninth Circuit is sitting by designation.

SUFFICIENCY OF EVIDENCE

Without going into the fetid details of appellants' fraudulent schemes and false statements, it is sufficient to say that the record supports their convictions on each of the counts on which they were convicted. This is particularly true when we invoke the rule in *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), and view the evidence and all permissible inferences in the light most favorable to the government. The fact that the court acquitted most of the co-defendant salesmen fortifies, rather than undermines, the validity of the convictions. This action clearly demonstrates the alertness of the court on the issue of intent. Obviously, the district court, as trier of fact, had a doubt on whether the salesmen, as distinguished from appellants, had an intent to participate in the fraudulent schemes. The record before us bears no resemblance to *United States* v. *Maybury*, 274 F.2d 899 (CA2 1960), upon which appellants rely. Nor did the court's offhand reference in its findings to co-appellant Berg's post-scheme statement in any way affect its ultimate findings of guilt against Allstate and Karp. It is clear that the court considered Berg's post-scheme statement only with reference to Berg, even though in many respects his actions characterized an important aspect of the over-all scheme to defraud. Absent a showing of substantive prejudice, the court, in a bench trial, is deemed to have considered only admissible and relevant material. *United States* v. *Penick*, 496 F.2d 1105, 1108 (CA7 1974). Even if, as contended by Allstate and Karp, the evidence was erroneously admitted as to them, the action should be considered harmless under Rule 52 (a), FRCrimP. There remains, aside from such evidence, an abundance of relevant and competent evidence to establish their guilt beyond a reasonable doubt.

The court's findings are sufficient to sustain the judgments of convictions as to all appellants and are fully supported by the evidence.

IMMUNITY

Without citing authority in support of their views, appellants Karp and Allstate contend that the district court committed error in denying Allstate's petition asking that defense witness Ross be granted use immunity from self-incrimination under the provisions of 18 U.S.C. §§ 6002 and 6003. Ross, an employee of an independent mortage company, asserted his Fifth Amendment privilege during the course of his direct examination and refused to answer questions with reference to the use of certain FHA forms.

In the petition for immunity, appellants offered to prove that Ross would testify that it was the policy and practice of his company and, so far as he knew, the practice of the mortgage banking industry to follow the practice commonly followed by appellants in filling out the particular forms. The district court held that it had no power under the statutes to grant the petition. We agree.

In our view, there is no significant difference between the statute before the court in *Earl* v. *United States*, 361 F.2d 531 (DC Cir. 1966), *cert. denied* 388 U.S. 921 (1967), and 18 U.S.C. §§ 6002 and 6003. Appellants' argument that the immunity involved in *Earl* was *transactional* and that the immunity before us is *use*, is a distinction without a difference. Under neither statute is anyone other than the United States Attorney, with the approval of superior officials, authorized to request an order granting immunity to a witness. While the Congress may have the power to grant appellants a right comparable to the right granted to the government, the judicial creation of such a right is beyond the power of the courts. *Earl*, *supra*, at 534.

The rule in *Earl* has been uniformly followed subsequent to the enactment of §§ 6002 and 6003. *Cerda* v. *United States*, 488 F.2d 720, 723 (CA9 1973); *United States* v. *Berrigan*, 482 F.2d 171, 190 (CA3 1973); *United States* v. *Jenkins*, 470 F.2d 1061, 1063-1064 (CA9 1972),

cert. denied 411 U.S. 920 (1973). As recently as August 6, 1974, this circuit in *United States* v. *Ramsey*, ... F.2d ...., No. 73-1580 (CA7 1974), in speaking on the subject, said: "[T]here is no merit to the argument that a defendant has a constitutional right to have immunity conferred upon a defense witness who exercises his privilege against self-incrimination." Here, as in *Ramsey*, the prosecution did not secure any of its evidence by means of an immunity grant. Our recent decision in *United States* v. *Watkins*, ... F.2d ...., No. 74-1287 (CA7 Nov., 1974), is consistent with these conclusions.

OTHER CONTENTIONS

(1) Appellants Allstate and Karp complain of the receipt in evidence of other false statements to the FHA similar to those charged in the indictment. This circuit recognizes the rule that evidence of prior similar offenses is admissible if it bears a strong resemblance to the pattern of the offenses charged. This evidence is higly relevant on the issue of knowledge and intent, as tending to show a consistent pattern of conduct. *United States* v. *Marine*, 413 F.2d 214, 216 (CA7 1969), *cert. denied* 396 U.S. 1001 (1970). *See also United States* v. *Jones*, 438 F.2d 461, 465-66 (CA7 1971), and *United States* v. *Turner*, 423 F.2d 481, 484 (CA7 1970), *cert. denied* 398 U.S. 967.

Appellants' reliance on *United States* v. *Baum*, 482 F.2d 1325 (CA2 1973), and *Mills* v. *United States*, 367 F.2d 366 (CA10 1966), is completely misplaced. *Baum* recognizes the rule just stated, but reversed the conviction on account of the government's failure to provide, in pre-trial proceedings, the name of the witness to the alleged prior crime. Reversal was further warranted by the trial court's denial of defendant's motion for a continuance to prepare cross-examination of the witness presenting the evidence of the prior offense. In substantial part, *Baum* stands for the proposition that the prosecution must disclose its witnesses to the defense prior to trial. *Mills*, too, recognizes that evidence of other offenses is admissible to show motive, intent, knowledge and course of conduct. The court reversed on the ground

that only one of a large number of "no fund" checks issued by defendant and received in evidence had anything whatsoever to do with the interstate transportation of a stolen motor vehicle, the crime charged in the indictment.

Other authorities cited by appellants have received our attention, but they are no more in point.

(2) Appellant Berg maintains that the district court committed error in denying his pre-trial motion for a severance. Since the ultimate decision rests within the sound discretion of the trial judge, *Opper* v. *United States*, 348 U.S. 84, 95 (1954), the appellant carries a heavy burden. Severance will be granted only for the most cogent reasons. The moving party must show that he will be unable to obtain a fair trial without severance, not merely that a separate trial will offer a better chance for acquittal. *United States* v. *Blue*, 440 F.2d 300, 302 (CA7 1971), *cert. denied* 404 U.S. 836. Another statement of the rule is that judicial economy, efficiency, speed and the public interest in avoiding multiple trials, dictates that defendants jointly indicted should be tried together, except for the most compelling reasons. *Parker* v. *United States*, 404 F.2d 1193, 1196 (CA9 1968), *cert. denied* 394 U.S. 1004 (1969); *United States* v. *Kahn*, 381 F.2d 824, 839 (CA7 1967), *cert. denied* 389 U.S. 1015. Our study of appellants' motion and of the evidence introduced during the course of the trial, convinces us that there was no abuse of discretion in denying the motion, nor did anything occur during the course of the trial which would require the court *sua sponte* to order a severance at the close of the government's case.

(3) Appellants' other contentions are peripheral to those just discussed. We find them meritless.

The judgments of conviction are affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
January 13, 1975

Before
Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. LATHAM CASTLE, SR. *Circuit Judge*
Hon. JOHN F. KILKENNY, SR. *Circuit Judge*

UNITED STATES OF AMERICA, Plaintiff-Appellee, No. 74-1322 vs. ALLSTATE MORTGAGE CORPORATION, et al., Defendants-Appellants.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. (73 CR 481)

On consideration of the petition for rehearing filed in the above-entitled cause,

It Is Ordered that the petition for rehearing in the aboved-entitled appeal be, and the same is hereby, DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1020

ALLSTATE MORTGAGE CORPORATION AND CHARLES KARP, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend (1) that the district court erred in refusing to grant immunity to a prospective defense witness, and (2) that the trier of fact considered hearsay evidence that was not admissible against petitioners.

Following a bench trial in the United States District Court for the Northern District of Illinois, petitioners were convicted on eleven counts of mail fraud, in violation of 18 U.S.C. 1341. In addition, petitioner Karp was convicted on five counts, and petitioner Allstate Mortgage Corporation on two counts, of making false statements to the Federal Housing Administration (FHA), in violation of 18 U.S.C. 1010. Karp was sentenced to concurrent terms of one year's imprisonment on each mail fraud count, and to concurrent terms of one year's imprisonment on each false statement count, the latter to run consecu-

tively to the concurrent terms on the mail fraud counts. Allstate was fined $18,000. The court of appeals affirmed (Pet. App. A).[1]

Petitioners' convictions arose out of a scheme to defraud homeowners and the FHA in connection with the issuance of housing loans. In 1971, Karp incorporated Allstate to operate the mortgage brokerage business that he had previously operated as a sole proprietor. Allstate's business activity entailed the solicitation of persons who were buying homes on contract, for the purpose of arranging FHA-insured mortgage refinancing for them. The buyers were first contacted through mail solicitations (Govt. Exs. 2-G-1, 7-A, 8-A), and then by sales representatives. The Allstate representatives misled potential customers in several respects. Allstate was portrayed as a mortgage company that would lend its own money, rather than as a broker (Tr. 227, 309, 1581), and potential customers were not informed that $1,000 of the mortgage proceeds would be paid to Allstate as a commission for arranging the mortgage financing.

Twelve government witnesses testified concerning their business dealings with Allstate. In a typical initial meeting, the Allstate representative would advise the potential customer that he would have to pay only a fee of approximately $50 to cover the costs of a credit investigation and appraisal. The Allstate representative would then request the customer to sign a number of documents allegedly relating to the credit investigation and property appraisal. Typically, the documents would be stacked in a manner that exposed the space for the customer's signature but concealed the documents' contents. In this way, Allstate would obtain the customer's signature on a blank agreement to pay for Allstate's

---

[1]The judgment of the court of appeals was entered on December 10, 1974, and rehearing was denied on January 13, 1975 (Pet. App. B). The petition for a writ of certiorari was filed on February 14, 1975, and is therefore out of time under Rule 22(2) of the Rules of this Court.

brokerage services. The customer would not be given copies of the documents (Tr. 55-57, 297-301, 303-305, 374-380, 465-467, 566-574, 1116-1117, 1302-1309, 1510-1513, 1557, 1587-1594, 1621-1624).

After the customer had signed the documents, Allstate would submit them to various approved mortgage companies for processing with the FHA. Most of the transactions leading to this prosecution related to mortgages obtained from Advance Mortgage Company, which would obtain FHA insurance for the funds it loaned to Allstate's customers. Karp and Allstate had an arrangement with Advance Mortgage by which Karp would retain the customer's blank fee agreement and furnish Advance with only a photocopy. An Advance representative would then complete the photocopied fee agreement by filling in a figure less than $1,000 in the space that had been left blank for Allstate's fee. This copy of the fee agreement would then be submitted to the FHA in support of the loan application. Karp, however, would complete the original copy of the fee agreement by filling in the figure of $1,000.

Upon approval of the application for mortgage insurance, the mortgage funds would be allocated by the mortgage company. An Allstate representative would then accompany the mortgagor to the Chicago Title and Trust Company to close the refinancing transaction. At that time, Allstate would receive a $1,000 brokerage fee out of the mortgage proceeds (Govt. Exs. 1-26-E-5, 2-E-5, 4-E-3, 4-E-4, 9-E-3, 9-E-4, 11-E-3, 11-E-4, 19-E-5). If the customer decided not to accept the refinancing, Allstate would institute a collection action based on the original copy of the fee agreement that Karp had completed (Govt. Exs. 3-21-D-1, 7-D-1, 8-23-D-1, 12-D-1, 14-D-1, 18-D-1, 19-D-1).

Karp played the major role in this scheme to defraud. As president of Allstate, he hired representatives to solicit contract buyers and directed their operations. Following the successful solicitation of a customer, Karp reviewed the documents and completed the blank fee agreements (Tr. 1824-1825). Karp also authorized legal actions in Allstate's name for the collection of fees from customers who decided, after committing themselves, not to refinance. Furthermore, Karp personally solicited customers on at least four occasions.[2] In each instance, Karp failed to disclose the $1,000 brokerage fee and concealed the contents of the fee agreement.

1. Wyatt Ross, an employee of a mortgage company, was called by the defense as a witness but asserted his privilege against self-incrimination during the course of direct examination. Petitioners claim (Pet. 4-11) that the trial court should have granted immunity to Ross as a defense witness, arguing that Ross would have testified that "it was an industry practice in Chicago for mortgagees to use estimates instead of actual figures for the closing cost requirements on the form" (Pet. 5). But if that was in fact an industry-wide practice, petitioner could have subpoenaed some other witness to testify to that effect. Since Ross's own testimony therefore was not indispensable, and was not considered, even by the defense, to be uniquely exculpatory, the trial court properly refused to grant Ross immunity against prosecutorial use of his testimony. See, *e.g.*, *United States* v. *Ramsey*, 503 F. 2d 524, 532 (C.A. 7); *Cerda* v. *United States*, 488 F. 2d 720, 723 (C.A. 9); *United States* v. *Berrigan*, 482 F. 2d 171, 190 (C.A. 3); *United States* v. *Jenkins*, 470 F. 2d 1061, 1063 (C.A. 9), certiorari denied, 411 U.S. 920; *Earl* v. *United States*, 361 F. 2d 531 (C.A. D.C.), certiorari denied, 388 U.S. 921.

---

[2]Accounts of Karp's solicitation activities are contained in the testimony relating to his dealings with Mr. Charles Wiginton, Mr. Paul Goss, Mr. and Mrs. George Schroeder, and Mr. and Mrs. Gerald Bowen.

2. Petitioners also argue (Pet. 11-16) that the trial court improperly considered evidence that had been admitted solely against Howard Berg, a co-defendant. Responding to the closing argument of petitioners' counsel that no scheme to defraud had been established, the court stated (Tr. 2518-2519; Pet. 14):

> [T]he method of selling here, totally apart now from whether there was or wasn't a scheme—the personal encounter, method of selling, door to door selling, those conversations unfolded in such a way that as Agent Van Loon has testified Mr. Berg said, he didn't disclose the fee if he was afraid he was going to lose the sale or the customer. And in some instances it seems reasonable to infer that a person in the situation that your witnesses were would demonstrate a particular type of interest in the transaction, might inquire on their own about what the fee was, the conversation might proceed in such a way as to cause the salesman to believe, "Here I can disclose it to them."
>
> And, indeed, you end up with a couple of agreements that are footnoted, percentages are used rather than dollar figures, and then you take another person who manifests apprehension about the fee, and the salesman concludes in this case, "I'm not going to tell him."

However, contrary to petitioners' contention that the court considered Berg's post-conspiracy statement against them, the extent of the court's consideration was made manifest in its findings: *"While Berg's statement is attributable only to him,* in many respects it characterizes an aspect of this scheme" (Tr. 2667-2668; emphasis added). Berg's statement was therefore taken by the court as merely illustrative of the fact, already established by the testimony of many of Allstate's customers, that the $1,000 fee was only selectively disclosed. The court's offhand reference to Berg's statement did not indicate that the court was considering that hearsay statement on the question of petitioners' guilt.

Absent a showing of substantive prejudice, a trial judge sitting without a jury is deemed to have considered only admissible and relevant evidence. *United States* v. *Penick*, 496 F.2d 1105, 1108 (C.A. 7), certiorari denied, 419 U.S. 897; *United States* v. *Schechter*, 475 F.2d 1099 (C.A. 5), certiorari denied, 414 U.S. 825; *United States* v. *McCarthy*, 470 F.2d 222, 224 (C.A. 6); *United States* v. *Stanley*, 411 F.2d 514, 516 (C.A. 7), certiorari denied, 396 U.S. 959. Moreover, in this case that presumption was reinforced by the trial judge's positive assertion that extraneous material had not been considered. See, *e.g.*, Tr. 2667.

But even if it were assumed *arguendo* that Berg's hearsay statement was erroneously considered against petitioners, the error was harmless in light of the overwhelming evidence of petitioners' guilt. See *Chapman* v. *California*, 386 U.S. 18; *United States* v. *Nicholson*, 492 F.2d 124 (C.A. 5); *United States* v. *Hudson*, 479 F.2d 251, 255 (C.A. 9), certiorari denied, 414 U.S. 1012; *United States* v. *McCarthy, supra*; *United States* v. *Stanley, supra*. As the court below properly noted, "[t]here remains, aside from such evidence, an abundance of relevant and competent evidence to establish their guilt beyond a reasonable doubt" (Pet. App. 2a). In contrast, in *Wong Sun* v. *United States*, 371 U.S. 471, and *United States* v. *Turnipseed*, 272 F. 2d 106 (C.A. 7), upon which petitioners rely (Pet. 15), the only evidence of guilt was the improperly considered post-conspiracy hearsay statement of a co-defendant.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.